

There is no basis for a constitutional challenge that this bill infringes upon a sex offender's right to privacy under Article II, Section 10, of the Montana Constitution, even though that is a fundamental right. According to the two following Montana Supreme Court cases, conviction for a sex offense does not fall under the category of the normally protected right to privacy.

In the first case, Mr. Mount argued, under several theories, that his right to privacy should prevail over the restrictions of the *Sexual or Violent Offender Registration Act*. As will be seen, the Supreme Court ruled otherwise. Similarly, in the second case, Mr. Wagner argued that he shouldn't have to register as a sex offender under the Act because his right to privacy should prevail after his rights as a citizen had been restored under another constitutional provision following his release. Again the Supreme Court disagreed.

As to both of these cases, quoting portions of the two cases: Conviction for a sex offense "does not fall under this category of protected rights [right to privacy]." Because the right to privacy is a "fundamental right" under Montana's Constitution, it requires the test of strict scrutiny. To satisfy this test, the State must show a "compelling state interest." In denying this right to privacy to a sex offender under this test, the Court explained the compelling state interest: "[T]he Act [*Sexual or Violent Offender Registration Act*] was adopted to protect the public from the recidivism of sex offenders; to prevent victimization of vulnerable children; and to assist law enforcement in keeping track of the whereabouts of sex offenders. Also, . . . , the Act is narrowly tailored in its registration and disclosure requirements to effect only those purposes in a reasonable manner."

In quoting the relevant portions of those two cases, I have added emphasis by putting certain portions in bold:

State v. Mount, 2003 MT 275, 317 Mont. 481, 78 P.3d 829:

¶93 Mount argues that because he was discharged, his rights as a citizen, including his right to privacy, were restored. As such, Mount argues that application of the retroactive provision of the Act offends his constitutional right to privacy.

¶94 The State argues that Article II, Section 28, of the Montana Constitution, and § 46-18-801(2), MCA, afford protection to those **rights commonly considered political and civil. The State also argues that Mount's conviction of sexual intercourse without consent does not fall under this category of protected rights. We agree with the State.**

¶95 Article II, Section 28(2), of the Montana Constitution provides: "Full rights are restored by termination of state supervision for any offense against the state." When debating Article II, Section 28, the delegates noted that "full rights," included all civil and political rights. Montana Constitutional Convention, Verbatim Transcript, March 9, 1972, p. 1800. Indeed, Delegate James stated: "[o]nce a person who has been convicted has served his sentence and is no longer under state supervision, he should be entitled to the restoration of all civil and political rights, including the right to vote, hold office, and enter occupations which require state licensing." Montana Constitutional Convention, Verbatim Transcript, March 9, 1972, p. 1800.

¶96 We echoed this same interpretation in our holding in *State v. Gafford* (1977), 172 Mont. 380, 563 P.2d 1129, wherein we concluded: In our view the constitutional provision refers to those rights commonly considered political and civil rights incident to citizenship such as the right to vote, the right to hold public office, the right to serve as a juror in our courts and the panoply of rights possessed by all citizens under the laws of the land. *Gafford*, 172 Mont. at 389-90, 563 P.2d at 1134.

¶97 The restoration-of-rights statute, § 46-18-801(2), MCA, provides: [I]f a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all *civil rights* and full citizenship, the same as if the conviction had not occurred. [Emphasis added by the Court.]

¶98 The language of Article II, Section 28, of the Montana Constitution does not afford Mount the benefit he seeks here. The

right of individual privacy under Article II, Section 10, of the Montana Constitution is a fundamental right. This requires that any legislative infringement of the right be subject to strict scrutiny analysis; be justified by a compelling state interest; and be narrowly tailored to effect only that interest. *Gryczan v. State* (1997), 283 Mont. 433, 449, 942 P.2d 112, 122.

¶99 While Mount's right to privacy may be implicated by having to register and disclose his whereabouts, we conclude that the State had a compelling interest in enacting the Act. As discussed at length above, the Act was adopted to protect the public from the recidivism of sex offenders; to prevent victimization of vulnerable children; and to assist law enforcement in keeping track of the whereabouts of sex offenders. Also, as discussed above, the Act is narrowly tailored in its registration and disclosure requirements to effect only those purposes in a reasonable manner.

¶100 Thus, we hold that the registration and disclosure requirements of the Act do not deprive Mount of any "rights" under Article II, Section 28, of the Montana Constitution. We also conclude that § 46-18-801, MCA, does not provide Mount any greater protection than does the Montana Constitution itself.

Wagner v. State, 2004 MT 31; 319 Mont. 413; 85 P.3d 750:

¶13 We began our analysis in *Mount* by focusing on which rights are constitutionally guaranteed to be restored upon termination of supervision for a criminal offense. Examining the transcripts of the Montana Constitutional Convention, earlier case law and the related statute, we determined that the "full rights" restored under *Article II, Section 28 of the Montana Constitution* following termination of state supervision for a criminal offense are civil and political rights incident to citizenship, including the right to vote, hold office and enter occupations which require state licensing. *Mount*, ¶95. **For that reason, we concluded privacy was not a right protected under Article II, Section 28. *Mount*, ¶98.**

¶16 *Mount* still controls, however, because the rights Wagner raises are not among the civil and political rights incident to citizenship which are restored under *Article II, Section 28* upon termination of supervision for a criminal offense. *See Mount*, ¶¶95-96. Given our analysis in *Mount*, it is clear that *Article II, Section 28* protects only such civil and political rights of citizenship as may have been abridged by supervision following a criminal conviction. Rights of citizenship do not include or equate to

individual rights enumerated in either the Montana or United States Constitutions. **We hold that SVORA's [*Sexual or Violent Offender Registration Act*] requirements do not deprive Wagner of any rights under *Article II, Section 28* of the Montana Constitution.**

This is a good bill, and it will protect our families.

Please pass this bill out of Committee and support it on the floor.

Harris Himes
Montana Values Alliance
(406)375-0097
Email: bigskycc@aol.com